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No. 01-1144

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RICHARD GILLIS, MICHAEL HANLON, PAUL RENNIE, AND JOYCE WEIGERS,

Petitioners,

v.

JASON DAVIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Date: April 22, 2002

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ARGUMENT

I. THE PETITIONERS PROPERLY CHARACTERIZED THE LAW IN ARGUING THAT THE COURT SHOULD CLARIFY THE IMPORTANT ISSUE OF WHETHER DICTA, IN A PRIOR CASE, IS SUFFICIENT TO "CLEARLY ESTABLISH" A RULE OF LAW FOR QUALIFIED IMMUNITY PURPOSES.

In their Petition for a Writ of Certiorari, the petitioners' argued that they were entitled to have judgment enter for them based on qualified immunity. Petitioner argued that it was not "clearly established" that a mental health worker or a nurse had a constitutional duty to intervene to prevent the use of excessive force by a co-worker on an involuntarily committed mental health patient, and that the First Circuit in *Davis v. Rennie*, 264 F.3d 86 (1st Cir. 2001) had improperly decided that such a duty was "clearly established" from dicta in a previous First Circuit case involving a police officer's duty to intervene to prevent the use of excessive force. *Gaudreault v. Salem*, 923 F.2d 203, 207 n.3 (1st Cir. 1990).

The respondent argues that the petitioners mischaracterized the law. There is no basis whatsoever for respondent's assertion. The respondent asserts that the petitioners' "central qualified immunity contention" is that there was no case law that held that a police officer had a duty to intervene to prevent the use of excessive force and that this misrepresented the state of the law in the Circuit. Res. Br. at 19. The petitioners made no such assertion. Rather, the petitioners argued that as of August, 1993, there was no case

reported which established that a *nurse or mental health worker* had a constitutional duty to intervene and therefore, the duty as to mental health workers or nurses was not clearly established. Pet. at 21. *See Durham v. Nu'man*, 97 F.3d 862, 870 (6th Cir. 1996) (Duggan, J., concurring in part and dissenting in part) ("I am aware of no precedent from this or any other court that has imposed liability on an individual (other than a police, correctional or security officer) for his or her failure to intervene, simply because he or she was, arguably, in a position to have prevented the beating.")

The respondent cannot dispute that the contours of the constitutional right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established. *Wilson v. Layne*, 526 U.S. 603, 615 (1999). In addition, there must be controlling authority in the jurisdiction at the time of the incident or which clearly established the rule, or a consensus of cases of persuasive authority. *Wilson*, 526 U.S. at 617. The respondent cannot and does not dispute that at the time of the incident, there were no controlling cases in the jurisdiction or a consensus of persuasive authority that applied the duty to intervene to prevent the use of excessive force to individuals other than police, correctional, or security officers, who are trained in security matters. The respondent is wrong to have suggested or argued otherwise.

II. A PUNITIVE DAMAGES FINDING DOES NOT PRECLUDE A QUALIFIED IMMUNITY DEFENSE.

Respondent argues that the petitioners are foreclosed, as a matter of law, from asserting the defense of qualified immunity given the imposition of punitive damages. Res. Br. at 24. A punitive damages finding does not preclude a qualified immunity defense because the inquiries for each question differ. *Iacobucci v. Boulter*, 193 F.3d 14, 26 n.8 (1st Cir. 1999).

Respondent contends that the punitive damages finding incorporates a determination that the petitioners knowingly violated the law with malicious subjective intent which is enough to defeat a claim of qualified immunity. Res. Br. at 25-26. Respondent bases his argument on *Procunier v. Navarette*, 434 U.S. 555 (1978). However, in 1998, the Court in *Crawford-El v. Britton*, 523 U.S. 574 (1998) noted that under the *Harlow v. Fitzgerald*, 457 U.S. 800 (1987) standard:

> "... a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant's subjective intent is simply irrelevant to that defense."

Id. at 588.

Punitive damages focuses on a subjective inquiry into the defendant's actions. *Iacobucci v.*

Boulter, 193 F.3d at 26 citing *Kolstad v. American Dental Ass'n.*, 527 U.S. 526, 534-35 (1999). Because the standards required to establish a defense of qualified immunity differ from the conduct required for a finding of punitive damages, the petitioners are not foreclosed as a matter of law from asserting the defense of qualified immunity.

III. "SHOCKS THE CONSCIENCE" IS THE APPROPRIATE STANDARD BECAUSE THE BASIS OF RESPONDENT'S CLAIMS IS SUBSTANTIVE DUE PROCESS, NOT THE FOURTH AMENDMENT.

The petitioners argue that for this substantive due process claim, the District Court erroneously charged an "objectively reasonable" standard rather than a higher standard of either "shocks the conscience" or "deliberate indifference." The respondent argues that the "shocks the conscience" standard is legally inapplicable because that standard cannot be employed for a claim based on a Fourth Amendment "seizure." Res. Br. at 12-13. Respondent argues that both the seclusion room and hallway restraints were Fourth Amendment seizures. Res. Br. at 12-13. However, respondent's argument is misplaced because respondent brought a § 1983 claim based on substantive due process, not the Fourth Amendment. *Davis v. Rennie*, 264 F.3d 86, 97-98 A.17-18a. The "shocks the conscience" standard can properly be applied to a substantive due process claim. *Sacramento v. Lewis*, 523 U.S. 833, 845-47 (1998).

CONCLUSION

For the reasons stated above and in the petitioners' Opening Brief, the judgment of the Court of Appeals for the First Circuit should be reversed.

Respectfully submitted,

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